respect to the purchase of individual channels. Moreover, the Bureau also failed to consider certain other factors directly relevant to the realistic service option test for both of Vision's packages. For example, Vision has not sought to disguise the individual service offerings or otherwise hide them from subscribers. More significantly, the Bureau ignored what may well be the most important consideration in determining whether individual channel purchases represent a realistic service option -- the fact that neither the SuperStation package nor the Preferred service package is heavily discounted when compared to the aggregate price of the individual channels. As discussed above, the individual SuperStation channels cost $0.75 each, with the package available for $2.00, a discount of only 33 percent. The Preferred Service channels are available as a package for $4.00, a 43 percent discount from the aggregate per channel rate of $7.00.[27]

B. The Bureau's Decision Treating Vision's *A La Carte* Offerings As Regulated Channels Is Arbitrary And Capricious.

As mentioned above, the Bureau's conclusion that Vision's *a la carte* service offerings did not represent a "realistic option" -- while clearly wrong -- at least was consistent with the conclusion reached by the Bureau in every other LOI decision. However, in the instant case the Bureau compounded its erroneous ruling on the realistic choice issue by refusing to accord Vision the same equitable relief accorded most other operators with respect to their *a la carte* packages -- even operators with higher rates, higher discounts,

[27]These discounts are comparable to discounts offered in the TVRO industry for services identical to those offered in the SuperStation and Preferred packages.

fewer remaining regulated channels, and fewer individual channel subscribers than Vision.[28] In deciding to treat Vision's *a la carte* service offerings as regulated channels, both retroactive to September 1, 1993 and on a prospective basis, the Bureau acted in a wholly arbitrary and capricious manner.[29]

According to the Bureau's decision, the reason that Vision was not accorded the same equitable relief accorded in most of the other LOI decisions was that Vision should have known what it was doing was wrong -- a kind of civil mens rea test. While the Bureau

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[28]See, e.g., Chattanooga Cable TV Co. (Chattanooga, TN), LOI-93-57, DA 94-1427 (rel. Dec. 22, 1994) (43 channels for $26.90); MultiVision Cable TV (Prince Georges Co., MD), LOI-93-15, DA 94-1352 (rel. Dec. 2, 1994) (discount over 60 percent); Comcast Cablevision (Mt. Clemens, MI), LOI-93-19, DA 94-1355 (rel. Dec. 2, 1994) (no individual channel subscribers); Century Cable TV (Muncie, IN), LOI-93-18, DA 94-1354 (rel. Dec. 2, 1994), (30 regulated channels/no CPS channels post-restructuring). A chart summarizing the various LOI cases is attached as Appendix G.

[29]The Commission, like other federal administrative agencies, is required to follow the rules and precedents it has set for itself. See, e.g., Atchison, Topeka & Santa Fe R.R. Co. v. Wichita Board of Trade, 412 U.S. 800, 808 (1973); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970); Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977). This principle was recently reiterated with respect to the Commission by the D.C. Circuit's decision in WLOS-TV, Inc. v. FCC, 932 F.2d 993 (D.C. Cir. 1991). There the court reversed and remanded the Commission's refusal to grant a television broadcast licensee's application for permission to operate as a satellite of another television station that partially overlapped its signal coverage area. Prior to the Commission's denial of the "satellite station" application under review in WLOS-TV, the Commission had considered two factors in considering such applications. WLOS-TV, 932 F.2d at 997. Yet, in denying the "satellite station" application under review in WLOS-TV, the Commission completely -- and without explanation -- based its decision solely on one of the factors, ignoring the other. Id. On remand, the D.C. Circuit directed the Commission either to follow its existing precedents or explain why it was deviating from them by considering only one of the two factors it previously had deemed relevant. Id. at 998. See also Southwestern Bell Telephone Co. v. FCC, 28 F.3d 165, 169 (D.C. Cir. 1994) (Commission must follow its previously-issued statement of criteria for exogenous cost treatment under telephone company price cap regulation).

admits that the Commission's rules were unclear regarding the permissibility of most *a la carte* offerings (thus warranting equitable relief), it contends that Vision should have known in September 1993 that eliminating an entire tier (even a four-channel mini-tier available as a separate and distinct service option) and turning it into an *a la carte* package would be deemed an evasion. LOI Order at ¶ 22. In support of this conclusion, the Bureau has cited certain statements in both the April 1993 Rate Order and the Second Recon. Order. The Bureau's stated rationale, however, fails to withstand scrutiny.

First, the Bureau has utterly failed to offer a rational basis for distinguishing the instant case from several other cases in which an entire tier was eliminated, but, unlike Vision, the operator was accorded equitable relief. In particular, the fact that Vision "eliminated" its four-channel entire Preferred Service mini-tier cannot, in and of itself, justify the decision not to accord Vision equitable relief. Other operators who eliminated entire tiers have had their actions excused. For example, Nashoba Cable Services (Danvers, MA), LOI-93-23, DA 94-1547 (rel. Dec. 22, 1994), the Bureau accorded equitable relief to an operator who completely unbundled a six-channel mini-tier, noting that the operator continued to offer a "significant" CPS tier of 21 channels. In the instant case, the separately available mini-tier unbundled by Vision had only four channels and, even after restructuring, Vision (like Nashoba) continued to offer its subscribers a 21 channel CPS tier.[30]

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[30]See also Century Cable TV (Yuma, AZ), LOI-93-39, DA 94-1360 (rel. Dec. 2, 1994) (equitable relief granted in case in which operator unbundled three channels from two CPS tiers, then moved all remaining CPS tier channels to basic tier, leaving system with no CPS tiers).

Similarly, with respect to the SuperStation Package, the Bureau cannot justify its refusal to accord Vision equitable relief simply because Vision unbundled four channels from its Broadcast Basic and Cable Service tiers. The Bureau has accorded equitable relief in a host of cases in which a few channels (rather than an entire tier) have been unbundled and offered individually and in a package. See, e.g., Comcast Cablevision (Tallahassee, FL), LOI-93-2, DA 94-1275 (rel. Nov. 18, 1994) (equitable relief accorded to 4 channel package consisting of one channel moved from 13 channel BST, 3 channels moved from 20 channel CPS tier); Dimension Cable Services (Oceanside, CA), LOI-93-36, DA 94-1310 (rel. Nov. 25, 1994) (equitable relief accorded to 4 channel package consisting of channels moved from 23 channel CPS tier).

In truth, the Bureau's decision not to accord Vision equitable relief was not based either on the fact that Vision eliminated its Preferred Service tier or on the fact that Vision created a new four channel SuperStation Package; rather the Bureau's decision was based solely on the total number of channels that Vision unbundled, without regard to the nature or size of the tiers on which the channels previously were offered, the nature or size of the *a la carte* packages, how many channels remain on regulated tiers, or the overall rate charged by the operator either before or after restructuring. Simply put, in every case in which an operator has unbundled six or fewer channels, equitable relief has been granted; and in every case involving a total of eight or more unbundled channels, the operator has been deemed an "evader" and ordered to treat its *a la carte* service offerings as regulated CPS channels, both prospectively and retroactively.

The Bureau itself has admitted, although not in any of its LOI decisions, that the basis for distinguishing between "good" and "bad" *a la carte* packages is the absolute number of services unbundled.[31] Yet, such a distinction is completely indefensible. There simply is nothing in either the April 1993 Report and Order or the August 1993 First Recon. Order (or, for that matter, the March 1994 Second Recon. Order) to indicate that unbundling six channels would be viewed differently than unbundling eight channels. For the Bureau to admit that any cable operator was uncertain as to the rules in this regard is to admit that Vision also must have been uncertain.

Second, even if the Commission disregards the Bureau's unstated, unsustainable rationale for distinguishing which operators are entitled to equitable relief, it must reverse the Bureau's decision in this case. This is because the Bureau's stated rationale -- that the initial Rate Order and the Second Recon. Order put Vision on notice that eliminating a tier would taint its entire *a la carte* structure -- reflects a fundamental misreading of the Commission's prior statements regarding *a la carte* service offerings. The Bureau relied in particular on note 808 of the April 1993 Report and Order as evidence that Vision should have known that its restructuring would be deemed an evasion. LOI Order at ¶ 22. In that note, the Commission stated that a cable operator could not escape rate regulation "simply by calling what otherwise would be a rate regulated tier an *a la carte* package." The Bureau also has

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[31]See FCC Public Notice, "Cable Services Bureau Announces Optional Procedures With Respect to Pending Pre-May 15 Benchmark Cases," DA 94-1556 (rel. Dec. 29, 1994) (LOI decisions have held *a la carte* packages of up to six channels as valid).

argued that the Commission's Second Recon. Order "reiterated" the Commission's warning to cable operators against unbundling an entire tier. Id.

Notwithstanding the Bureau's efforts at revisionist interpretation, it is clear that note 808 of the Report and Order did not render it per se unlawful to unbundle an entire tier. Rather, note 808 plainly was directed at the Commission's concern over "sham" offerings -- situations in which an operator merely "announced" that tiered services were available individually, but did not market or attempt to sell the services on an individual basis.[32] That is not what Vision did. Vision established and sold each of the SuperStation and Preferred Service channels on an *a la carte* basis and clearly described the individual channel option to its subscribers.

The fact that the Bureau has misread note 808 of the Report and Order is confirmed by note 809, wherein the Commission did address situations in which the component parts of a tier were unbundled and then rebundled as an *a la carte* package, indicating only that such collective offerings would be subject to regulation if the operator "simply replicate[d] its existing service structure through the rebundling of *a la carte* packages of services, without also continuing to offer these services *a la carte*." Vision, which continued to offer all of the unbundled services on a true *a la carte* basis, relied on this statement in restructuring. Vision also relied on numerous statements in the Report and Order encouraging unbundling, as well as on the fact that, only days before Vision launched its new service structure, the

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[32]For example, a per channel offering, while theoretically available, might not be deemed a realistic service choice if the operator's Customer Service Representatives did not disclose this option to customers or the individual prices were not included on the system's rate card.

Commission reaffirmed these statements, expressly acknowledging that the incentive to unbundle tiered services "is created by the statute itself" and that "restructuring program offerings to provide more *a la carte* offerings is not per se undesirable." Report and Order, supra at ¶¶ 327-29; First Recon. Order, supra at ¶ 35.

The Bureau also has mischaracterized the Second Recon. Order, which was released in March 1994, some seven months after Vision restructured its services in September 1993. First, to the extent the Second Recon. Order expressed concerns about operators unbundling entire tiers, that concern reflected a new standard for judging *a la carte* packages, not a reaffirmation of anything that can be found in the April 1993 Report and Order. Second, given that the Commission has now acknowledged that the 15-factor test announced in the Second Recon. Order was essentially unworkable and failed to give operators any clear guidance regarding the status of their *a la carte* service offerings, the Bureau's reliance on a decision that did not even exist in September 1993 is wholly inappropriate. Going Forward Order, supra at ¶ 45. The Bureau also ignored the Commission's clear statements in the Second Recon. Order that "[n]o single factor will necessarily be dispositive in any case" and that decisions would be based on a weighing of the "totality of the circumstances." Second Recon. Order, supra at ¶ 196. Instead, the Bureau unabashedly has stated that a single factor -- the unbundling of an entire tier -- is the sole basis for subjecting Vision's *a la carte* package to treatment as a regulated tier. LOI Order at ¶ 22.[33]

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[33]The courts have indicated that agencies may not, in applying balancing tests, give determinative weight to a single factor without offering a reasoned explanation for its action. See, WLOS-TV, Inc. v. FCC, 932 F.2d 993 (D.C. Cir. 1991) (discussed at note 18, supra). See also Yepes-Prado v. U.S. I.N.S., 10 F.3d 1363, 1370 (9th Cir. 1993).

Finally, with respect to the Bureau's determination that Vision should have known that its service restructuring would be deemed an evasion, it is most significant that, as mentioned above, the NJBPU -- having before it the same information as Vision -- evaluated and approved Vision's *a la carte* structure prior to the release of the LOI Order.[34] The Bureau's position that Vision knowingly evaded the Commission's rules also must be weighed against the fact that the rate complaint that triggered the LOI in this case did not even mention the fact that Vision had restructured its service offerings as well as the fact that the LOI itself never raised the issue of whether Vision had unbundled a whole tier of service -- a rather obvious question if the criteria for assessing an *a la carte* package was as clear as the Bureau now claims.

C. The Commission Should Instruct The Bureau To Fashion Appropriate Relief.

As the foregoing discussion demonstrates, considering all of the facts surrounding Vision's *a la carte* service structure, it is clear that Vision has given subscribers a realistic service option with respect to the purchase of individual channels. Consequently, the Bureau's determination that Vision's service restructuring constituted an evasion must be reversed and the order directing Vision to treat the SuperStation and Preferred Service packages as regulated tiers for purposes of calculating its rates back to September 1, 1993

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[34]Conversely, in other instances, the Bureau has accorded equitable relief to operators whose *a la carte* packages have been rejected by local franchising authorities. Compare TKR Cable of Hamilton Twshp., NJ, LOI-93-31, DA 94-1312 (rel. Nov. 25, 1994) (*a la carte* package deemed NPT) with Multichannel News, August 22, 1994 at page 39 (reporting that NJBPU had ordered TKR to treat *a la carte* package as regulated tier).

must be rescinded. Furthermore, the SuperStation and Preferred Service collective *a la carte* offerings should not be subject to regulation on a going-forward basis.[35]

Even if the Commission affirms the Bureau's conclusion that individual SuperStation and Preferred Service channel subscriptions did not represent a "realistic choice" and that Vision's *a la carte* packages are subject to regulation, it remains clear that the Bureau should have treated Vision's *a la carte* packages as NPTs. Vision's *a la carte* packages are essentially indistinguishable from packages treated as NPTs in numerous other cases and fundamental principles of equal protection and due process require that Vision be accorded the same equitable relief as other operators.[36]

The inequity in the Bureau's approach, as applied to Vision, is best illustrated as follows: as of September 1992, System A and System B each offer identical service in the form of a 15 channel basic tier and a 15 channel CPS tier. On September 1, 1993, both

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[35]Although the Commission has held that all *a la carte* packages are CPS tiers subject to regulation, Going Forward Order, at ¶ 45, this decision is directly at odds with the terms of the 1992 Cable Act, which defines the term "cable programming services" as excluding video programming offered on a per channel basis "regardless of service tier." 47 U.S.C. § 543(l)(2) (emphasis added). Contrary to the Commission's interpretation, the exemption from regulation applicable to *a la carte* video programming is not limited to services offered exclusively on a per channel basis, but also encompasses *a la carte* programming even when it is offered as part of a service tier. In addition, redesignating Vision's *a la carte* packages as regulated CPS tiers on the basis of the Commission's revised interpretation raises significant concerns regarding retroactive rulemaking. See, e.g., Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 745-46 (D.C. Cir. 1986).

[36]See, e.g., Consolidated Nine, Inc. v. FCC, 403 F.2d 585, 593 (D.C. Cir. 1968) (inconsistent treatment of broadcast applicants an abuse of discretion). See generally U.S. v. Welden, 568 F. Supp. 516, 534 (N.D. Ala. 1983) (guarantees of due process and equal protection require that individuals not be subjected to arbitrary or uneven exercises of power).

systems "unbundled" the same four channels from their basic and CPS tiers and begin offering them on an *a la carte* basis, individually as well as in a collective package. In addition, both systems also expand their capacity to add 5 identical new services, which are affirmatively marketed as a "mini-tier," separate and distinct from the basic and CPS tiers. The only difference between the two systems is that System A expands its capacity and begins offering subscribers the 5-channel mini-tier on January 1, 1993, while System B waits two years, until January 1, 1995, to expand its capacity to add the mini-tier channels. Under the Bureau's LOI rulings, System A must treat both its four-channel *a la carte* package and its five-channel mini-tier as regulated CPS tiers. In contrast, System B, which offers exactly the same service structure, is permitted to treat both the *a la carte* package and the mini-tier as NPTs.

System A demonstrates Vision's plight. The Preferred Service package, introduced in March 1993, and affirmatively marketed as a separate service offering, closely resembles the kind of "new product tier" the Commission's going forward rules seek to promote. Yet, the Bureau effectively is penalizing Vision simply for giving its subscribers more services and more choices sooner than other systems. Moreover, as previously discussed, the Bureau's approach also penalizes Vision for not melting down channels and for attempting to minimize the impact of tier neutrality on basic-only customers, decisions that undeniably enhanced consumer choice and welfare. Because the Bureau's decision represents not only a gross miscarriage of justice, but also bad public policy, the Commission must grant the relief sought herein.

III. CONCLUSION.

For the foregoing reasons, the Commission should grant Vision's Application for Review, vacate the LOI Order, and direct the Bureau to enter a new order granting appropriate relief.

Respectfully submitted,

VISION CABLE TELEVISION COMPANY

Charles S. Walsh
Seth A. Davidson

Fleischman and Walsh, L.L.P.
1400 16th Street, NW, Suite 600
Washington, DC 20036
202/939-7900

Its Attorneys

Dated: January 23, 1995

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EXHIBIT B

LETTER OF INQUIRY DECISIONS

SYSTEM	NUMBER OF CHANNELS UNBUNDLED 9/1/93	NUMBER OF REGULATED CHANNELS PRE-POST 9/1/93	ALC PACKAGE DISCOUNT	PRICE PER CHANNEL POST 9/1/93 (NON-PREMIUM)	REGULATED NON-ALC TIERS PRE-POST 9/1/93	EQUITABLE RELIEF GRANTED
11/18/94						
ADELPHIA South Dade (93-42)	32	50/18	17%	.50	2/1	NO
COMCAST Tallahassee (93-2)	4	33/29	56%	.62	2/2	YES
TIME WARNER Milwaukee (93-14)	4	51/47	30%	.47	2/2	YES
11/25/94						
PARAGON Irving (93-25)	2	47/48	25%	.45	2/2	YES
CENTURY Huntington (93-49)	3	33/30	26%	.75	3/1	YES
TKR Louisville (93-46) Hamilton (93-31)	 4 4	 36/32 44/40	 8% 4%	 .67 .58	 3/2 4/2	 YES YES
DIMENSION Phoenix (93-30) Oceanside (93-36) Rancho P.V. (93-37)	 4 4 4	 37/33 41/39 43/39	 50% 51% 50%	 .62 .63 .55	 3/2 2/2 3/2	 YES YES YES

22131/1

SYSTEM	NUMBER OF CHANNELS UNBUNDLED 9/1/93	NUMBER OF REGULATED CHANNELS PRE-POST 9/1/93	ALC PACKAGE DISCOUNT	PRICE PER CHANNEL POST 9/1/93 (NON-PREMIUM)	REGULATED NON-ALC TIERS PRE-POST 9/1/93	EQUITABLE RELIEF GRANTED
12/2/94						
COMCAST						
Mt. Clemens (93-19)	4	41/43	57%	.47	3/2	YES
Warren (93-33)	4	41/43	56%	.47	3/2	YES
Flint (93-35)	4	39/43	57%	.49	3/2	YES
MULTIVISION						
P.G. County (93-15)	4	60/58	62%	.41	2/2	YES
SOUTHWESTERN						
San Diego (93-41)	4	39/38	25%	.58	2/2	YES
TIME WARNER						
Brookville (93-26)	3	33/30	34%	.68	2/2	YES
W. Hernando (93-26)	3	32/29	34%	.72	2/2	YES
Everett (93-16)	3	47/44	33%	.50	3/2	YES
CENTURY						
Morgantown (93-34)	3	31/28	25%	.83	2/1	YES
Yuma (93-39)	3	31/28	29%	.86	3/1	YES
Muncie (93-18)	4	34/30	16%	.74	3/1	YES
Owensboro (93-45)	3	39/36	25%	.70	3/1	YES
12/12/94						
CENTURY						
Brunswick (93-44) (94-4)	6	55/49	9%	.37	3/1	YES

22131/2

SYSTEM	NUMBER OF CHANNELS UNBUNDLED 9/1/93	NUMBER OF REGULATED CHANNELS PRE-POST 9/1/93	ALC PACKAGE DISCOUNT	PRICE PER CHANNEL POST 9/1/93 (NON-PREMIUM)	REGULATED NON-ALC TIERS PRE-POST 9/1/93	EQUITABLE RELIEF GRANTED
CABLEVISION						
Hillsborough (94-6)	3	31/30	44%	.63	3/3	YES
CABLEVISION IND.						
Long Beach (93-40)	5	52/48	46%	.49	2/2	YES
Smithfield (94-9)	3	33/32	33%	.70	2/2	YES
Morrisville (94-10)	3	33/32	33%	.71	2/2	YES
CENTURY						
San Juan (93-38)	3	47/44	28%	.63	3/1	YES
COMCAST						
Howard Cty. (93-3)	3	36/38	57%	.54	2/2	YES
Sterling Hts. (94-11)	4	41/44	56%	.46	3/2	YES
US CABLE						
Lake Forest (93-13)	4	50/51	20%	.56	2/2	YES
12/22/94						
CENTURY						
Los Angeles (93-17)	12	36/31	11%/33%	.69	2/1	NO
Beverly Hills (93-17)	12	55/49	11%/33%	.56	2/2	NO
DYNAMIC						
Hialeah (93-43)	10	44/41	34%/46%	.48	3/2	NO

22131/3

SYSTEM	NUMBER OF CHANNELS UNBUNDLED 9/1/93	NUMBER OF REGULATED CHANNELS PRE-POST 9/1/93	ALC PACKAGE DISCOUNT	PRICE PER CHANNEL POST 9/1/93 (NON-PREMIUM)	REGULATED NON-ALC TIERS PRE-POST 9/1/93	EQUITABLE RELIEF GRANTED
NEWCHANNELS						
Binghamton (93-48)	12	40/28	25%/23%/30%	.62	4/2	NO
Ft. Lee (93-32)	8	42/34	33%/43%	.62	3/2	NO
Lincoln (93-47)	10	49/39	49%	.50	3/2	NO
Charlotte (93-24)	8	47/39	36%/30%	.53	3/2	NO
SCRIPPS HOWARD						
Chattanooga (93-51)	4	43/42	34%	.56	3/2	YES
CABLEVISION						
Boston (93-12)	12	64/51	72%	.44	3/2	NO
CABLEVISION IND.						
Wake Forest (94-7)	3	33/32	33%	.71	2/2	YES
NASHOBA						
Danvers (93-23)	6	49/51	50%/35%	.70	3/2	YES
FALCON						
Port Orchard (93-50)	6	35/29	56%	.69	3/1	YES
So. Shores (94-2)	9	35/29	58%	.56	3/1	NO
12/30/94						
C-TEC						
McBain (93-1)	10	23/13	70%	.95	1/1	NO
Blendon (93-1)	17	33/16	74%	.67	1/1	NO
Holland (93-1)	16	32/16	72%	.69	2/1	NO

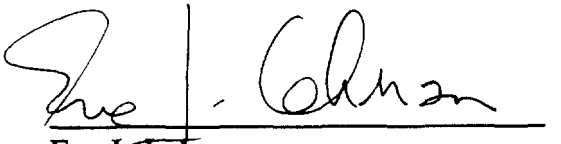
22131/4

CERTIFICATE OF SERVICE

I, Eve J. Lehman, a secretary at the law firm of Fleischman and Walsh, hereby certify that a copy of the foregoing "Response Of Newhouse Broadcasting Corporation To Petitions For Reconsideration" was served this 3rd day of February 1995, via first class mail, upon the following:

Paul Glist, Esq.
Cole Raywid & Braverman
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
Counsel for Continental Cablevision

Brenda Fox, Esq.
Dow Lohnes & Albertson
1255 23rd Street, N.W., Suite 500
Washington, D.C. 20037
Counsel for Cox Communications, Inc.



Eve J. Lehman